



NATURAL RESOURCES DEFENSE COUNCIL

March 14, 2011

**VIA ELECTRONIC MAIL
AND UNITED STATES MAIL**

Freedom of Information Officer
U.S. EPA, Region 5 (MI-9J)
77 West Jackson Boulevard
Chicago, IL 60604-3590
r5foia@epa.gov

RE: Freedom of Information Act request regarding Clean Air Act compliance at four Illinois coal-fired power plants

Dear FOI Officer,

On behalf of the Natural Resources Defense Council ("NRDC"), I write to request the disclosure of records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and the applicable U.S. Environmental Protection Agency ("U.S. EPA") regulations, 40 C.F.R. § 2.100, *et seq.*

I. Description of Records Sought

Please produce all records¹ in the possession or control of U.S. EPA regarding the following categories of information about any of the following electric generating facilities in Illinois: E.D. Edwards (7800 South Cilco Lane, Bartonville, IL 61607); Hennepin Power Station (13498 East 800th St. Hennepin, IL 61327); Newton Power Station (6725 N. 500th, Newton, IL 62448); or Wood River Power Station (#1 Chessen Lane, Alton, IL 62002) (collectively, the "Subject Plants"):

1. All records regarding compliance with the Clean Air Act's ("CAA") New Source Review ("NSR") and Prevention of Significant Degradation ("PSD") programs, including but not limited to any records regarding alterations, modifications or improvements made to equipment or infrastructure at the Subject Plants;
2. All records regarding opacity violations from March, 2006 to present at the Subject Plants;

¹ The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders, and filings.

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3. All requests for information pursuant to Clean Air Act ("CAA") Section 114 directed to the owner or operator of any of the Subject Plants;
4. All records provided in response to a CAA Section 114 request to any of the Subject Plants.
5. Any records concerning correspondence between USEPA and Illinois EPA or the owners or operators of the Subject Plants concerning compliance with NSR and PSD programs or opacity requirements.

II. Request for a Fee Waiver

FOIA dictates that requested records be provided without charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as a "representative of the news media" entitled to a reduction of fees under the FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 C.F.R. § 2.107(c)(1)(iii).

A. First Requirement

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii). Specifically, the requested disclosure would satisfy the four elements identified at 40 C.F.R. § 2.107(l)(2).

The requested records concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i). Along with its state counterparts, U.S. EPA is responsible for enforcing compliance with the NSR and PSD programs under the Clean Air Act ("CAA"). USEPA has issued a Notice of Violation concerning NSR/PSD and opacity violations at coal-fired power plants operated by Midwest Generation. There is substantial public interest in ascertaining the scope of USEPA's enforcement activities against other coal-fired power plants in the State of Illinois. Records regarding U.S. EPA's fulfillment of its obligation to enforce the CAA, including related correspondence between U.S. EPA, Ohio EPA, and owners and operators of the Subject Plants, plainly concerns the operations of government.

The requested records are "likely to contribute" to public understanding of the activities described above. *Id.* § 2.107(l)(2)(ii). The tailored requests in this letter seek materials, including communications between agencies, that have not previously been made public. These materials will contribute meaningfully to public understanding of government activities, specifically U.S. EPA enforcement activities in Illinois.

Disclosure of these records will also "contribute to the understanding of a reasonably broad audience of persons interested in the subject," 40 C.F.R. § 2.107(l)(2)(iii). NRDC has already generated significant press coverage regarding actions taken to enforce compliance with the CAA at other coal-fired power plants. *See, e.g.,* Kari Lyderson, "The Clunkers of the Power Plant World," *Washington Post* August 17, 2009; Kari Lyderson, "Chicago Without Coal,"

Chicago Reader October 4, 2010; Tom Giambroni, "Green groups challenge Baard permit," *Lisbon Morning Journal* (Oct. 17, 2008); Jessica Heffner, "Environmental groups oppose SunCoke air permit application," *Middletown Journal* (Sept. 8, 2008), available at <http://www.middletownjournal.com/n/content/oh/story/news/local/2008/09/08/mj090908cokeopp.html>; Bret Schulte, "A Big Fine for the Nation's Largest Utility: American Electric Power to pay more than \$5 billion for Clean Air Act violations," *U.S. News & World Report* (Oct. 9, 2007), available at <http://www.usnews.com/articles/news/national/2007/10/09/a-big-fine-for-the-nations-largest-utility.html>; Paul Wilson, "Two environmental groups oppose new coal-fired plant," *The Columbus Dispatch* (Dec. 5, 2007) at 07B. In addition, NRDC has actively worked to present the public with information about the economic, public health, and environmental risks of coal-fired power plants and liquid coal technology, holding forums in Columbiana County, Ohio regarding the proposed Baard Energy Liquid Coal Facility and presenting information regarding the proposed American Municipal Power Generation Station to the residents and City Councils of American Municipal Power's municipal members. Similarly, NRDC will disseminate summaries and analysis of any newsworthy information conveyed in the requested records.

NRDC has a proven ability to digest and disseminate such information quickly and effectively. In addition to its website (www.nrdc.org), which is updated daily and draws approximately 2.7 million page views and 800,000 visits per month, NRDC has numerous other means to widely disseminate information to the public including numerous and varied publications, educational programs, media initiatives, and public interest litigation.

For example, NRDC publishes a magazine, *OnEarth*, on environmental and public health subjects of current interest, which is read by approximately 450,000 individuals through subscriptions, sales at newsstands and bookstores, and access free of charge at <http://www.nrdc.org/onearth>. Similarly, NRDC publishes and distributes *Nature's Voice*, a newsletter with information regarding current environmental matters, five times a year to approximately 420,000 members nationwide and online at <http://www.nrdc.org/naturesvoice/default.asp>, as well as other newsletters and alerts. NRDC's *Earth Action* email list has more than 145,000 subscribers who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/action/default.asp>. NRDC sends its *Legislative Watch* bulletin to more than 35,000 people biweekly during Congressional sessions and publishes the bulletin online at <http://www.nrdc.org/legislation/legwatch.asp>. *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to more than 60,000 subscribers and made available online at <http://www.nrdc.org/thisgreenlife/default.asp>. NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has over twenty staff members dedicated to communications work, see "Communications" staff list at <http://www.nrdc.org/about/staff.asp>.

Finally, NRDC employees provide Congressional testimony, appear on television, radio and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. See, e.g., testimony of Gina M. Solomon, M.D., M.P.H., NRDC Senior Scientist, before United States Senate Committee on Environment and Public Works, Feb. 6, 2007; transcript, "Climate Change: Experts gauge fallout

from G8 nations' nonbinding decision on global warming, E&ETV, *On Point*, July 12, 2005 (featuring NRDC Climate Center Deputy Director Dan Lashof)); transcript, "Protest Raised over New Tests of Naval Sonar," National Public Radio, *All Things Considered*, July 24, 2007 (featuring NRDC Marine Mammal Project Director Joel Reynolds); conference panel outline, "Enforcement of Environmental Laws: Equalizing Effect on Compliance Efforts?," 2007 Environmental Law Conference at Yosemite, Oct. 19, 2007 (featuring NRDC Senior Attorney Michael E. Wall)), 15 (editorial, "California's cool(ing) opportunity," *San Francisco Chronicle*, Apr. 11, 2006 (co-authored by NRDC California Energy Program Director Devra Wang); and publisher's notes to *Saving Energy, Growing Jobs: How Environmental Protection Promotes Economic Growth, Profitability, Innovation and Competition* (Bay Tree Publishing 2007), by NRDC Energy Program Director David B. Goldstein); *see also* sources cited below.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <http://www.nrdc.org/air/energy/taskforce/tfinx.asp>. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention. *See, e.g.,* Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times* (Mar. 28, 2002), at A22; Bennett Roth, "Houston Energy-Drilling Firm Appears in Documents from Energy Department," *Houston Chronicle* (Apr. 12, 2002).
- (2) NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," (Apr. 3, 2002); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times* (Apr. 4, 2002), at A19.
- (3) NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website, *see* <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life*. *See* NRDC, *Sounding the Depths II* (Nov. 2005) (update to 1999 report). Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.,* "Protest Raised over New Tests of Naval Sonar," National Public Radio, *All Things Considered*, July 24, 2007.

- (4) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. See Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists* (Mar./Apr. 2004).
- (5) NRDC has used White House documents obtained through FOIA to inform the public about EPA's failures to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. See <http://www.nrdc.org/health/pesticides/natrazine.asp>; see also William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?," *Harper's Bazaar* (Aug. 1, 2006) (referencing documents obtained and posted online by NRDC).
- (6) NRDC has obtained through FOIA information on the levels of arsenic in drinking water supplies across the country. NRDC incorporated much of the information into a report, *Arsenic and Old Laws* (2000), printed and made available online through NRDC's website, see <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>, and provided analysis describing its significance and guiding interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune* (June 5, 2000) at B1 (referencing NRDC report).
- (7) In 2000, NRDC used information obtained through FOIA to publish a report analyzing the impacts of manure pollution from large livestock feedlots on human health, fish and wildlife. See NRDC, *Spills & Kills* (Aug. 2000).
- (8) In 1999, NRDC obtained through FOIA a Defense Department document, *History of the Custody and Deployment of Nuclear Weapons: July 1945 through September 1977*. The document attracted significant press attention once it was disclosed. See, e.g., Walter Pincus, "Study Says U.S. Secretly Placed Bombs; Cold War Deployments Affected Mostly Allies," *Washington Post* (Oct. 20, 1999) at A3. One of NRDC's nuclear scientists, Robert Norris, published a detailed analysis of this document explaining its significance to the public. Robert S. Norris, William M. Arkin, and William Burr, "Where They Were," *Bulletin of Atomic Scientists* (Nov./Dec. 1999).
- (9) In 1996, NRDC obtained through FOIA test results regarding lead levels in the District of Columbia's drinking water supplies. NRDC made the test results public along with analysis explaining the significance of the results. See D'Vera Cohn, "Tap Water Safeguards Still Stalled; City Failed to Tell Some Residents of Excess Lead Contamination," *Washington Post* (Apr. 18, 1996) at J1.
- (10) In 1989, NRDC obtained through FOIA testimony, previously suppressed by the first Bush administration, by federal experts who opposed oil drilling off the coasts of California and Florida. See Larry Liebert, "Oil Testimony Reportedly Quashed;

Environmentalists say Federal Experts Pressured by Bush," *Orange County Register* (Oct. 5, 1989) at A6.

(11) In 1988, NRDC obtained through FOIA a report by the U.S. Fish and Wildlife Service that declared that the government's review of offshore oil drilling in Northern California was incomplete and overly optimistic. Reagan Administration officials had tried to keep the report secret and then repudiated it upon its release. See Eric Lichtblau, "Federal Report Blasts Offshore Oil Studies," *L.A. Times* (June 4, 1988) at A32.

(12) In 1982, NRDC obtained through a FOIA request a U.S. EPA memorandum stating that most air pollution monitors have repeatedly underestimated levels of toxic lead in the air. NRDC used the memorandum to inform the public about the consequences of EPA's proposal to relax restrictions on lead in gasoline. See Sandra Sugawara, "Lead in Air is Undermeasured, EPA Section Chief's Memo Says," *Washington Post* (July 11, 1982) at A6.

Disclosure of the requested documents is "likely to contribute significantly to public understanding," 5 U.S.C. § 552(a)(4)(iii); 40 C.F.R. § 2.107(l)(2)(iv), because NRDC intends to disseminate any newsworthy information in the released records, and its analysis of such records, to its member base and to the broader public, through one or more of the many communications channels referenced above. As NRDC's long history of incorporating information obtained through FOIA into reports, articles and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.²

B. Second Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). NRDC is a not-for-profit organization and, as such, has no commercial interest. 40 C.F.R. § 2.107(l)(1). "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); see also *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). NRDC's interest in obtaining the requested materials is to serve the public interest by disclosing presently non-public information regarding compliance at the Subject Plants with CAA requirements. NRDC has no commercial interest in the provision of such information to the public.

C. NRDC Is a Media Requester

² For example, information NRDC obtained through FOIA requests resulted in the following articles, in addition to those referenced above: Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *New York Times* (Jan. 11, 2005); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *New York Times* (Aug. 22, 2003); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *New York Times* (Apr. 27, 2002).

Even if U.S. EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under the FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II), 40 C.F.R. § 2.107(c)(1)(iii), (I). Under FOIA, a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. United States Dep't of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public). As described earlier in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has approximately 450,000 readers and is available at newsstands and bookstores; publishes a periodic newsletter for its more than 420,000 members nationally; issues regular electronic newsletters, action alerts, public reports and analyses; and maintains a free online library of reports and analyses. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals and books; television, radio, and web programs; and hearings and conferences. As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of NRDC's publications or other suitable channels.

III. Willingness to Pay Fees Under Protest

Please provide the records above irrespective of the status and outcome of your evaluation of NRDC's fee category assertion and fee waiver request. In order to prevent delay in U.S. EPA's provision of the requested records, NRDC states that it will, if necessary and under protest, pay fees in accordance with 40 C.F.R. § 2.107(c)(1)(iv), (c)(2), and (d). Please consult with me, however, before undertaking any action that would cause the fee to exceed two hundred dollars. Such payment will not constitute any waiver of NRDC's right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

IV. Conclusion

I trust that, in responding to this request, U.S. EPA will comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations. *See, e.g.*, 40 C.F.R. § 2.104(a)-(d), (f). Please produce the records above by sending them to the following:

Ann Alexander
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606

Please produce the documents on a rolling basis; at no point should U.S. EPA's search for—or deliberations concerning—certain records delay the production of others that U.S. EPA has already retrieved and elected to produce.

In the event U.S. EPA concludes that some of the records requested above may already be publicly available, I will be happy to discuss those conclusions in an effort to narrow the scope of this request. Please do not hesitate to call or email me with questions.

Thank you for your prompt attention to this request.

Sincerely,

A handwritten signature in cursive script that reads "Ann Alexander".

Ann Alexander
Senior Attorney
Natural Resources Defense Council
(312) 651-7904